

SOUTH AFRICA / JUDGMENT

Thipe v S (A114/2018) [2019] ZAGPPHC 206 (6 June 2019)

[2019] ZAGPPHC 206

COURT

North Gauteng High Court, Pretoria

BEFORE

SA Thobane, SNI Mokose

CASE / FILE NUMBER

A114/2018

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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

(1)

REPORTABLE

: NO

(2)

OF

INTEREST TO OTHER JUDGES: NO

(3)

REVISED

CASE NO: A114/2018

6/6/2019

In

the matter between:

ERIC
MATILEWANE THIPE
APPELLANT
and
THE
STATE
RESPONDENT

JUDGMENT

THOBANE AJ,

[1] The appellant was arraigned together with his co-accused in the Regional Court sitting at Pretoria North on the following counts;

Count 1, Robbery with aggravating circumstances read with section 51(2) of the Criminal Law Amendment Act 105 of 1997;

Count 2, Conspiracy to commit robbery with aggravating circumstances, and Count 3, Attempted murder.

[2] The appellant, who was accused 2 at the trial and was legally represented throughout, pleaded guilty to count 1, that of robbery with aggravating circumstances. The state accepted his plea and he was accordingly found guilty on count 1.

[3] The appellant was sentenced to 15 years imprisonment. This appeal which is directed at the sentence only, is with leave of the trial court granted on 11 October 2016.

[4] The facts giving rise to the conviction of the appellant are briefly as follows;

4.1. On 29 August 2014 the appellant together with his co-accused travelled to Kameeldrift, outside Pretoria but within this division, intent on committing, among others, the crime of robbery with aggravating circumstances.

4.2. On arrival they proceeded to intentionally and unlawfully assault one Mr Barend van den Veen and by force using a firearm, robbed him of his VW Minibus, Venter trailer, toolbox and various tools, his property and in his lawful possession. The assault was cruel and vicious. He was tied up with a neck tie and was also strangled therewith. His face and his back were burned with coal. He was burned with a cigarette on his back. His nose and ears were bruised using a pair of pliers (vice-grip).

4.3. After the robbery and when the appellant and his co-accused were on their way to Mamelodi, they were arrested. The stolen goods were recovered.

[5] In mitigation of sentence, the appellant did not give oral evidence however his legal representative addressed the court from the bar and submitted the following;

5.1. That he is 42 years of age;

5.2. That he is single;

5.3. He grew up with 4 siblings and his father passed away when he was still attending school;

5.4. He attended formal schooling and passed grade 8, but dropped out due to financial constraints;

5.5. He has two dependents born in 2007 and 2008 and the mother of these dependants is unemployed;

5.6. That he was unemployed at the time of his arrest;

5.7. That he had a 10 years old previous conviction which related to possession of an unlicensed firearm;

5.8. That he has been in custody for 2 years awaiting his trial;

5.9. That he did not benefit from the robbery as they were arrested soon after they left the scene of the robbery and that the loot was recovered during the arrest;

5.10. That although the robbery was premeditated and had been pre-planned, he was not part of the planning;

5.11. That he co-operated fully with the police;

5.12. That he was remorseful of his conduct and was therefore a suitable candidate for rehabilitation.

[6] On behalf of the respondent it was submitted that although the appellant was not involved in the planning of the robbery, the crime was nevertheless premeditated. It was further submitted that the complainant was severely assaulted. The fact that one of the appellant's co-accused used her affinity to the complainant to gain entry to his house was accentuated as one of the aggravating factors. From the state's point of view, the appellant displayed no remorse and therefore there were no substantial and compelling circumstances to speak of in the matter, warranting a deviation from the minimum sentence of 15 years.

[7] In argument before us, counsel for the appellant submitted that the nub of his submission was that the sentencing court failed to take into account the fact that the appellant spent two years in custody while awaiting trial. Counsel for the respondent on the other hand was of the view that there was no misdirection on the part of the sentencing court and that this court should not interfere with the imposed sentence. The sentencing court, it was submitted, was correct in sentencing the appellant to 15 years imprisonment.

[8] As is often said, sentencing is primarily a matter falling within the sole discretion of the trial court. A court considering an appeal against sentence therefore does not have a general discretion to interfere with the sentence. It may do so in two very circumscribed circumstances: firstly, if it is found that there has been an improper exercise of judicial discretion in that the sentence is vitiated by irregularity or misdirection; or secondly, if the disparity between the sentence of the trial court and the sentence which the appellate court would itself have imposed is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate".

[9] In *Kgosimore v S* 1999 (2) SACR 238 (SCA) at par [10], the Supreme Court of Appeal held that:

"It is trite law that sentence is a matter for the discretion of the court burdened with the task of imposing the sentence. Various tests have been formulated as to when a court of appeal may interfere. These include, whether the reasoning of the trial court is vitiated by misdirection or whether the sentence imposed can be said to be startlingly inappropriate or to induce a sense of shock or whether there is a striking disparity between the sentence imposed and the sentence the court of appeal would have imposed. All these formulations, however, are aimed at determining the same thing; viz. whether there was a proper and reasonable exercise of the discretion bestowed upon the court imposing sentence. In the ultimate analysis this is the true inquiry.... Either the discretion was properly and reasonably exercised or it was not. If it was, a court of appeal has no power to interfere; if it was not, it is free to do so. I can accordingly see no juridical basis for the stricter test suggested by counsel; nor is there anything in section 316B of the Criminal Procedure Act, or for that matter section 310A, to suggest otherwise... It follows that, in my view, whether it is the attorney - general (now the Director of Public Prosecutions) or an accused who appeals against a sentence, the power of a court of appeal to interfere is the same. "

[10] In the locus classicus, *S v Malgas* 2001 (1) SACR 469 (SCA) at 478D per Marais JA, the following is stated;

"A court exercising appellate jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellate court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is at large. However, even in the absence of material misdirection, an appellate court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellate court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate"."

[11] It is our view that the approach to sentencing that was adopted by the court cannot be faulted. Our reading of the judgment by the sentencing court is that the magistrate was alive to the fact that the conviction attracted a minimum sentence of 15 years in accordance with section 51(2) of the Criminal Law Amendment. The magistrate correctly held that in order to deviate from the prescribed sentences, the court must be satisfied that substantial and compelling circumstances exist. In that event, the court must then proceed to list them whereafter it may impose a sentence which is lesser than the prescribed minimum.

[12] The nub of this appeal therefore is whether the period of 2 years which the appellant served while awaiting finalisation of the trial, should have been taken into account, thus resulting in a reduced sentence than the 15 years imposed by the sentencing court. The magistrate relied heavily on the dicta purportedly from *David Kekana v State* (629/2013) [2014] ZASCA 158 (1 October 2014). I am certain that the magistrate erroneously referred to the *Kekana v S*

matter in which the appellant was appealing against conviction and sentence in respect of a murder of his wife whom he set alight and for which he was sentenced to life imprisonment. The dicta that he relied upon is in fact from Radebe and Another v S (726112)

[2013] ZASCA 31; 2013 (2) SACR 165 (SCA) (27 March 2013) whose facts to a certain extent match those in casu. The test set out in Radebe and Another v S, which the sentencing court quoted is stated thus:

"And accordingly, in determining, in respect of the charge of robbery with aggravating circumstances, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997 (15 years' imprisonment for robbery), the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one. (Underlining my emphasis).

[13] In this matter having analysed the reasons for postponement of the case, the sentencing court found that the appellant and his co-accused were to blame for the delay in finalising the trial. The court found that at the commencement of the trial the appellant had intended to proceed with the trial on the basis of a not guilty plea and changed "halfway into the finalisation of the matter". In Radebe and Another v S, the appellants were found to have been responsible for the delay of the trial in that, inter alia, they had insisted on engaging private counsel in circumstances where they could not afford one and in addition through changing their versions during the trial necessitating the court to hold a trial within a trial. Those factors are in our view clearly distinguishable from those in this case in so far as the appellant is concerned. Another distinguishing factor is that the appellant was not part of the planning of the robbery. He came in at a much later stage and his role seemingly was limited. The sentencing court rejected the submission about the appellant's absence during the planning stages, as "flimsy". The court also found that the appellant's previous conviction which was said to be more than 10 years old, was an aggravating factor. The court reasoned, that it was a weighty consideration that the appellant had been 27 years of age when he committed the offence which gave rise to the previous conviction. We could find no reason from the record why such a conclusion was reached.

[14] The court took the view that the plea of guilty was not mitigatory. It found that the state had an "open and shut" case against the appellant and his co-accused and that the plea of guilty was not indicative of contrition or remorse. During the application for leave to appeal before the court a quo the magistrate seemed to have accepted, and this is one of the reasons why he granted leave, that in treating the applicant, who was not present when the crimes were planned, the same as his co-accused who planned the crimes, he erred. His acceptance of the error is encapsulated in the dicta below which is extracted from his judgment when he granted leave;

"With hindsight, and although this aspect was not raised by the first applicant or by his legal representative during the trial stage and post trial, I do find that the fact that the first applicant did not feature during the planning stage should have worked in his favour with the result that I should not have treated the first applicant the same way as I did the second applicant and erstwhile co-accused 7 ultimately."

We are therefore at liberty to interfere.

[15] It is our view that the court's characterisation of the absence of the appellant in the planning of the crimes as "flimsy" was a misdirection. In our view the sentencing court should have taken into account the period of two years which the appellant spent in custody while awaiting trial.

[16] We make the following order in the result;

1. The appeal against sentence is upheld;
2. The sentence of 15 (fifteen) years imprisonment is set aside and replaced with the following sentence;

"The accused is sentenced to 13 (thirteen) years imprisonment."

3. The sentence in 2 above is antedated to 11 August 2016.

SA THOBANE

ACTING JUDGE OF THE HIGH COURT

I AGREE, AND IT IS SO ORDERED

SNI MOKOSE

JUDGE OF THE HIGH COURT

Date heard

: 21 May 2019

Date of Judgment

: 6 June 2019

Counsel for the Appellant : Adv. Moeng

Counsel for the Respondent : Adv. Roos

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